

§ 17.33

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The presiding officer may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the presiding officer, any party may file a response to such motion.

(d) The presiding officer may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

§ 17.33 The hearing and burden of proof.

(a) The presiding officer shall conduct a hearing on the record to determine whether the respondent is liable for a civil money penalty and, if so, the appropriate amount of any such civil money penalty considering any aggravating or mitigating factors.

(b) In order to prevail, the Center must prove respondent's liability and the appropriateness of the penalty under the applicable statute by a preponderance of the evidence.

(c) The respondent must prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the presiding officer, who may order closure only to protect trade secrets or confidential commercial information, as defined in § 20.61 of this chapter, information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, or other information that would be withheld from public disclosure under part 20 of this chapter.

§ 17.34 Determining the amount of penalties and assessments.

(a) When determining an appropriate amount of civil money penalties and assessments, the presiding officer and the Commissioner of Food and Drugs or entity designated by the Commissioner to decide the appeal (currently the DAB) shall evaluate any circumstances that mitigate or aggravate the viola-

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tion and shall articulate in their opinions the reasons that support the penalties and assessments imposed.

(b) The presiding officer and the entity deciding the appeal shall refer to the factors identified in the statute under which the penalty is assessed for purposes of determining the amount of penalty.

(c) Nothing in this section shall be construed to limit the presiding officer or the entity deciding the appeal from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 17.35 Sanctions.

(a) The presiding officer may sanction a person, including any party or counsel for:

(1) Failing to comply with an order, subpoena, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including, but not limited to, those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with a discovery order, including discovery and subpoena provisions of this part, the presiding officer may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(3) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) The presiding officer may exclude from participation in the hearing any legal counsel, party, or witness who refuses to obey an order of the presiding officer. In the case of repeated refusal, the presiding officer may grant judgment to the opposing party.

(e) If a party fails to prosecute or defend an action under this part after

service of a notice of hearing, the presiding officer may dismiss the action or may issue an initial decision imposing penalties and assessments.

(f) The presiding officer may refuse to consider any motion, request, response, brief, or other document that is not filed in a timely fashion or in compliance with the rules of this part.

(g) Sanctions imposed under this section may be the subject of an interlocutory appeal as allowed in §17.18(b), provided that no such appeal will stay or delay a proceeding.

§ 17.37 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) Direct testimony shall be admitted in the form of a written declaration submitted under penalty of perjury. Any such written declaration must be provided to all other parties along with the last known address of the witness. Any prior written statements of witnesses proposed to testify at the hearing shall be exchanged as provided in §17.25(a).

(c) The presiding officer shall exercise reasonable control over the manner and order of questioning witnesses and presenting evidence so as to:

(1) Make the examination and presentation effective for the ascertainment of the truth;

(2) Avoid undue consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The presiding officer shall permit the parties to conduct such cross-examination as may be required for a full disclosure of the facts.

(e) At the discretion of the presiding officer, a witness may be cross-examined on relevant matters without regard to the scope of his or her direct examination. To the extent permitted by the presiding officer, a witness may be cross-examined on relevant matters with regard to the scope of his or her direct examination. To the extent permitted by the presiding officer, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading

questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the presiding officer may order witnesses excluded so that they cannot hear the testimony of the other witnesses. This rule does not authorize exclusion of:

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party designated to be the party's sole representative for purposes of the hearing; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by a party engaged in assisting counsel for the party.

(g) If a witness' testimony is submitted in writing prior to cross-examination, the cross-examining party need not subpoena the witness or pay for his or her travel to the hearing. The sponsoring party is responsible for producing the witness at its own expense, and failure to do so shall result in the striking of the witness' testimony.

§ 17.39 Evidence.

(a) The presiding officer shall determine the admissibility of evidence.

(b) Except as provided in this part, the presiding officer shall not be bound by the "Federal Rules of Evidence." However, the presiding officer may apply the "Federal Rules of Evidence" when appropriate, e.g., to exclude unreliable evidence.

(c) The presiding officer shall exclude evidence that is not relevant or material.

(d) Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Relevant evidence may be excluded if it is privileged under Federal law.

(f) Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in settling or attempting to settle a civil money penalty assessment which was disputed as